BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 41 to 46 of the record. The order affirming the judgment of the District Court is at page 46, the order denying the motion for a rehearing is at page 55 of the original record and page 53 of the copies filed, and the certificate of the Clerk of the Court of Appeals is at page 58 of the original record and at page 54 of the copies.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, now being Section 347 (a), Title 28, U. S. Code.

2. The date of the judgment of the trial court is December 19, 1940 (Rec. p. 26). An appeal was duly perfected and there was a judgment in the Circuit Court of Appeals on June 24, 1941 (Rec. p. 46). Motion for a rehearing was overruled by the Circuit Court of Appeals on July 28, 1941 (Original Rec. p. 55, Copies p. 53).

III.

STATEMENT OF THE CASE.

In the petition, at pages 2 to 9, is a full statement of the case so far as the law and the facts are material to the consideration of the questions here presented. In the interest of brevity this statement is not repeated.

IV.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that petitioner's bill in equity cannot be entertained to cancel the policy.

2. In holding that judgment in the suit at law, establishing fraud in the procurement of the policy would be res judicata which can be availed of as to all subsequent claims for indemnity.

V.

SUMMARY OF ARGUMENT.

A.

Specification of Error I.

The reason assigned by the Circuit Court of Appeals for its holding that petitioner's bill in equity cannot be entertained to cancel the policy, is because the contingency upon which petitioner became liable on the policy had occurred before the suit in equity was filed; that respondent was asserting a liability against petitioner based upon the policy, and that petitioner has the opportunity in the action at law to contest its liability on the ground that the policy was procured through fraud and misrepresentation.

The decision is erroneous for several reasons: (1) The contract of insurance is a Missouri contract, and must be construed according to the laws of Missouri. Under the laws of Missouri, fraud and misrepresentation in the procurement of an insurance policy is not a defense to an action to recover under the policy for any disability insured against, unless the fraud and misrepresentation is material to the disability claimed by the policyholder. The question of whether fraud and misrepresentation in the procurement of a policy is material to the disability asserted is, under the laws of Missouri, a question for the jury. The policy is still in force. No claim is made by petitioner's bill in equity that respondent misrepresented any facts in his application except as to the disease and condition affecting his eyesight, and as to consultation with and treatment by physicians and other practitioners for such disease and condition. If, therefore, respondent should suffer a disability covered by the policy, but not connected with nor brought about by the disease or condi-

tion of his eyes, the fact that respondent had falsely and fraudulently misrepresented the facts as to the condition of his eyesight would not be available to petitioner as a defense against an action for such unrelated disability; (2) petitioner's remedy in the pending law action is not complete and adequate, and no adequate remedy is available to petitioner except by the suit in equity filed by it; (3) respondent's motion to dismiss petitioner's bill in equity is directed to the sole proposition that said bill in equity fails to state a cause of action or a claim upon which relief can be granted. The bill in equity does state a cause of action upon which relief can be granted, and, therefore, petitioner is entitled to a trial of the issues raised by its bill.

American Life Insurance Company v. Stewart, 300 U. S. 203, 81 L. Ed. 605;

Dawson v. Kentucky, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638;

Cf. McClellan v. Carland, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762;

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 27 L. Ed. 636;

Leimer v. State Mutual Life Assurance Co. (C. C. A. 8), 108 F. (2) 302;

Lincoln Nat. Life Ins. Co. v. Hammer (C. C. A. 8), 41 F. (2) 12;

Terry v. New York Life Ins. Co. (C. C. A. 8), 104 F. (2) 498;

Jefferson Standard Life Ins. Co. v. Keeton (C. C. A. 4), 292 F. 53;

Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A. 5), 294 F. 886;

Densby v. Acacia Mutual Life Ins. Co. (C. C. A. D. C.), 78 F. (2) 203;

Hanson v. Neal, 215 Mo. 256, 114 S. W. 1073;

New York Life Ins. Co. v. Cobb, 219 Mo. A. 609, 282 S. W. 494.

B.

Specification of Error II.

The holding of the Circuit Court of Appeals that judgment in the law action establishing fraud in the procurement of the policy would be res judicata as to all subsequent claims for indemnity is erroneous. The true rule, as followed by the federal courts and the courts of Missouri, as stated by the Circuit Court of Appeals for the Eighth Circuit in a case where the argument was advanced that a judgment in a law action "establishing fraud in the procurement of the policy would be res judicata in any action * * * under the double indemnity provisions of the policy." The Circuit Court of Appeals said:

> "Assuming that a judgment in the law action now pending should establish the fact that the insured obtained the policy by means of fraudulent representations in the application, that fact in subsequent suit upon the policy by the insured * * * will be immaterial unless a jury also finds that the matter misrepresented actually contributed to the contingency or event on which the policy becomes payable. Under these circumstances it cannot be said that the insurer's remedy is complete and adequate in the pending law action."
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> **Terry v. New York Life Insurance Co.**, 104 Fed. (2d) 498, 500.

Missouri cases announcing the same rule are:

Aetna Life Ins. Co. v. Daniel, 328 Mo. 876, 42 S. W. (2) 584;

Schuermann v. Union Central Life Ins. Co., 165 Mo. 641, 65 S. W. 723;

Birch Tree State Bank v. Dowler, 167 Mo. A. 373, 151 S. W. 784;

Smith v. Dye, 88 Mo. 581.

would bar any future claim under the policy.

ARGUMENT.

I.

The Fact That Petitioner May Defend Against Respondent's Action at Law on the Ground That Respondent Procured the Policy Through Fraud and Misrepresentation Does Not Deprive Petitioner of Its Right to a Trial on the Merits of Its Bill in Equity to Rescind the Policy.

The Court of Appeals has erroneously decided that a successful defense against respondent's action at law, on the ground that respondent was guilty of fraud and misrepresentation in the procurement of the policy. Before petitioner would be entitled to a judgment in respondent's action at law to collect indemnities for disabilities resulting from the loss of respondent's eyesight, petitioner would have to establish not only that respondent procured the policy through fraud and misrepresentation, but that the particular fraud and misrepresentation practiced by him contributed to the loss of his eyesight, because both the Federal Courts and Courts of Missouri have consistently held that an insurance company will not be relieved from paying indemnity under a policy issued by it on the ground that the policy was procured through fraud, unless the fraud was material to the risk insured against, and actually contributed to bring about the contingency or circumstance upon which a claim of liability is based. To illustrate, the policy involved in this case provides for the payment of monthly indemnities for disability resulting from the loss of both hands, both feet, or of one hand and one foot, as well as for the loss of the sight of both eyes, provided that such loss is the result of accidental injury or sickness.

If, then, the respondent should lose both hands or both

feet, or one hand and one foot, as result of gout, gangrenous poisoning, gunshot wound, or any disease or accidental injury, and if the petitioner should refuse to pay the monthly indemnity on the ground that respondent had falsely and fraudulently misrepresented the condition of his eyes at the time he applied for the policy, such defense would avail petitioner nothing in a lawsuit by respondent to recover benefits for any such disability unless a jury should find that respondent's fraudulent misrepresentations concerning the condition of his eyes actually contributed to the loss of his hands or feet.

Under such circumstances, it appears that the decision of the Court of Appeals is wrong wherein it holds that petitioner's bill in equity cannot be entertained on the theory that *one of the contingencies* (the loss of respondent's eyesight) upon which the benefits under the policy might become payable had occurred before the suit in equity was filed, to wit: that respondent was asserting a liability against petitioner because of the loss of his eyesight, and that petitioner might contest its liability in that action on the ground of fraud and misrepresentation. The loss of respondent's eyesight is *not the only contingency upon which the policy issued by petitioner becomes payable*, and therefore the rights and liabilities of the parties for all time to come are not fixed simply by reason of the fact that respondent has lost his eyesight. There are many contingencies upon which the policy becomes payable, some of which are mentioned above.

The indemnities thus far mentioned are contained in part I of the policy under the paragraph entitled "Monthly Indemnity for dismemberment and loss of sight."

Part II of the policy provides for "Indemnity for loss of time from disability," and provides that "if the Insured shall be disabled by accidental injury or by sickness and by reason of such disability shall necessarily

suffer loss of business time, the Company will pay indemnity'' so long as the insured lives and continuously suffers loss of all business time, and provides further that in the case of partial loss of business time ''the Company will pay one-half said monthly indemnity for the continuous period of such partial loss of time not exceeding six months * * *.''

Thus, it is seen that the company is obligated by the terms of the policy to pay indemnity for loss of time resulting from disability caused by accidental injury or sickness of any kind. So, if respondent should lose his suit at law and should fail to collect indemnities for the loss of his eyesight and should thereafter contract pneumonia, tuberculosis, heart trouble, or any other disease that would cause him to lose time from his business, the petitioner would be forced to pay indemnity for such loss of time unless it could establish that the disability was directly related to the condition of respondent's eyesight existing at the time he applied for the policy.

Thus, it is clear that petitioner's opportunity to defend against respondent's suit at law does not afford petitioner a complete and adequate remedy in the premises, and that petitioner cannot be afforded a complete recovery in any action at law on the policy.

''When a party has been deprived of his right by fraud, accident or mistake, and has no remedy at law, a court of equity will grant relief.''

Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665, 666.

It has also been held that to warrant dismissal of a bill for want of equity it must clearly appear *from the allegations of the bill* that a cause of action does not exist.

Leimer v. State Mutual Life Assurance Company (C. C. A. 8), 108 Fed. (2nd) 302, 305.

II.

A Judgment in the Action at All Establishing Material Fraud in the Procurement of a Policy Would Not Be Res Judicata as to Subsequent Claims for Indemnity Under the Policy Without a Finding That the Fraud Practiced in the Procurement of the Policy Was Material to the Contingency Forming the Basis of the Subsequent Claim.

This proposition is so closely related to the proposition advanced under specification of error I, that additional argument seems unnecessary to establish it. What was said by the Circuit Court of Appeals in this case is directly opposed to its holding in **Terry v. New York Life Insurance Company**, 104 Fed. (2nd) 498, 500, that a judgment in a law action establishing the fact that a policy was obtained through fraud and misrepresentation would be immaterial in a subsequent suit upon the policy unless it be established in such subsequent suit "*that the matter misrepresented actually contributed to the contingency or event on which the policy becomes payable.*"

CONCLUSION.

From the above it seems clear that the rights of the parties are not fixed because the contingency upon which respondent bases his present action at law is not the only contingency upon which the policy might become payable; that under such circumstances it cannot be said that the remedy of petitioner is complete and adequate in the pending law action brought by respondent, and that petitioner cannot have a complete remedy except at equity. Therefore, it is respectfully submitted that petitioner is entitled to a trial on the merits of the issues raised by its bill in equity; that the decision of the Court of Appeals to the

contrary is in conflict with the decisions of the Supreme Court, with the decisions of the other Circuit Courts of Appeals, with its own prior decisions, and with the decisions of the courts of the State of Missouri.

Petitioner, therefore, prays that this petition for certiorari be granted, and that the judgment of the Eighth Circuit Court of Appeals be reversed.

WAYNE ELY,
Tenth Floor Commerce Building,
St. Louis, Missouri,
Attorney for Petitioner.